

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE COMMISSIONER OF VETERANS AFFAIRS

Harry B. Guza,

Petitioner,

vs.

Lyon County,

Respondent.

**FINDINGS OF FACT,
CONCLUSIONS AND
RECOMMENDED DECISION**

The above-entitled matter came on for hearing before Administrative Law Judge Barbara L. Neilson at 10:00 a.m. on August 19, 2005, at the Lyon County Government Center, 607 West Main Street, Marshall, Minnesota. The OAH record remained open until September 28, 2005, for the receipt of post-hearing reply briefs.

Raymond Walz, Attorney at Law, Walz Law Office, 230 East Third Street, Post Office Box 50, Redwood Falls, MN 56283, appeared representing the Petitioner, Harry B. Guza. Richard R. Maes, Lyon County Attorney, 607 West Main Street, Marshall, MN 56258, appeared representing Lyon County.

NOTICE

This report is a recommendation, not a final decision. The Commissioner of Veterans Affairs will make the final decision after a review of the record. The Commissioner may adopt, reject or modify these Findings of Fact, Conclusions, and Recommendations. Under Minn. Stat. § 14.61, the final decision of the Commissioner shall not be made until this Report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Commissioner. Parties should contact Jeffrey Olson, Commissioner, Department of Veterans Affairs, 206C Veterans Service Building, 20 West 12th Street, St. Paul, MN 55155, to learn the procedure for filing exceptions or presenting argument.

If the Commissioner fails to issue a final decision within 90 days of the close of the record, this report will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2a. The record closes upon the filing of exceptions to the report and the presentation of argument to the Commissioner, or upon the expiration of the deadline for doing so. The Commissioner must notify the parties and the Administrative Law Judge of the date on which the record closes.

Under Minn. Stat. § 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law.

STATEMENT OF ISSUE

The issue in this case is whether the County's decision to eliminate the Petitioner's position was made in good faith for a legitimate purpose within the meaning of the Veterans Preference Act.

The Administrative Law Judge concludes that the County has not demonstrated that its decision to eliminate the Petitioner's position was made in good faith for a legitimate purpose.

Based upon all of the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. The Petitioner, Harry B. Guza, is a 58-year old man who is entitled to the protections of the Veterans Preference Act, and the County is subject to that Act.^[1]

2. During 2003, the University of Minnesota Extension Office went through a reorganization and moved to a regional model rather than a county model. As a result of the reorganization, Lyon County entered into a contract with the University of Minnesota to "buy back" services provided by the Extension Office's 4-H Program in order to ensure that the 4-H Program continued to operate locally. Under the contract, the County Board pays for a particular level of services to be provided in Lyon County by the 4-H educator. This practice continued to be in place as of the date of the hearing.^[2]

3. Prior to the reorganization of the University of Minnesota Extension Office, a 20-year employee provided clerical support to the entire Extension Office located in Lyon County. After the reorganization, only the 4-H program and one educator (Nicole Coequyt) remained in the County. Loren Stomberg, who has been the County Administrator for Lyon County since August 2003, felt that a full-time clerical position for the smaller extension operation could not be justified, but did not want to reduce the incumbent to part-time because she would lose benefits. Mr. Stomberg approached Jim Hubley, the County Veterans Service Officer (VSO), and asked him if he would be interested in sharing a clerical position with the Extension Office's 4-H Program.^[3] Mr. Hubley was pleased when Mr. Stomberg approached him about a shared position and expressed interest in that approach.^[4] Mr. Stomberg had some concerns before he suggested the shared position because the technical clerk would be asked to

understand two very different programs and also because of the personalities of the two department heads.^[5]

4. The County thereafter proceeded to develop a shared technical clerk position, which would be shared by the VSO and the 4-H Program. The County Board approved the shared technical clerk position in November of 2003. The position was to be funded by the County and was included in the County budget for 2004.^[6] During the discussions with the County Board, one of the County Commissioners asked Mr. Stomberg if he could justify the new position. Mr. Stomberg responded that he believed that it would provide better service for veterans because someone would be closer to the office to help with messages and things of that nature.^[7] Half of the payment for the shared position came from the budget for the Veterans Service Office and the other half came from the 4-H Program.^[8] At the time the shared position was created, the County believed that the VSO had a need for clerical assistance.^[9]

5. The VSO and 4-H offices were physically moved together when the shared position was created. At the time the shared position was created, it was unknown how much time the clerk would spend working for each of the offices.^[10]

6. Prior to March 2004, Bob Byrnes of the University of Minnesota's Regional Extension Office expressed concerns to Mr. Stomberg regarding whether the two offices could work together and the ability of the employee who was then holding the position to perform the 4-H services.^[11]

7. The Petitioner was hired on March 8, 2004, for the shared technical clerk position.^[12] He was provided with a position description for the job.^[13] The Petitioner was paid by Lyon County for his work in the position.^[14] The Petitioner had previously worked in the Veterans Service Office for approximately three years as a work/study student. He had received veteran's benefits so he understood those benefits.^[15] Mr. Hubley advocated for the Petitioner's hire because the Petitioner knew how to work with veterans to obtain services.^[16]

8. Although the 4-H and Veterans Service Office positions were different, the clerical skills required for each part of the shared clerk position were similar. The clerk answered phones, handled people, used the computer, performed clerical work, and used similar equipment when working in both areas.^[17]

9. On average, the Petitioner received 10-15 telephone calls each day with respect to his work for the Veterans Service Office. It also was common for members of the public to walk into the office without an appointment and seek assistance.^[18]

10. Because the Petitioner knew a lot about the Veterans Service Office, it was agreed that he would spend more of his time during the first six

months with the 4-H Program and later he would split his time equally between the two programs. During the initial period of the Petitioner's employment, he spent approximately 20% of his time working for the Veterans Services Office and approximately 80% of his time working for the 4-H Program.^[19] Mr. Hubley did not initially give the Petitioner all the work that needed to be done, but did a lot himself.^[20] The 4-H office was busier during the summer months. After the state fair was over, the Petitioner began to do more work for the Veterans Service Office.^[21]

11. Shortly after the Petitioner began working in the shared position, difficulties developed between the Petitioner and Ms. Coequyt. The Petitioner's conflict with Ms. Coequyt had more to do with personality and with the fact that Ms. Coequyt did not want the Petitioner there than with any issue concerning the skills required for the shared clerk position. In fact, Ms. Coequyt had difficulties or personality conflicts with others as well, including temporary staff and others who dealt with the 4-H Office.^[22] The Regional Extension Office raised concerns with Mr. Stomberg regarding the Petitioner's ability to perform 4-H program services.^[23]

12. The Petitioner and Ms. Coequyt met within three weeks after he began his employment to discuss the situation. Ms. Coequyt told the Petitioner that she had not wanted to hire him because she preferred to have a woman in the shared technical clerk position. Ms. Coequyt believed that the woman she wanted could have done the 4-H job with little or no training.^[24]

13. In Mr. Hubley's opinion, the Petitioner was an excellent employee who performed his work in a correct and timely manner. When the Petitioner was working for the Veterans Services Office, Mr. Hubley was better able to keep up with the work of the Office. Mr. Hubley was comfortable leaving the Office when the Petitioner was there.^[25]

14. Ms. Coequyt eventually gave the Petitioner a negative performance review. She told him that the negative evaluation might mean that he would be transferred and, no matter what, she wanted him out. She also told him that she felt a younger person might do a better job.^[26]

15. Mr. Stomberg conducted an investigation regarding the Petitioner's performance and ultimately recommended that the Petitioner be discharged.^[27] On approximately October 1, 2004, the County gave the Petitioner a letter notifying him that the County intended to discharge him from his employment. The County placed the Petitioner on leave. He continued to receive full pay until December 31, 2004. No action was taken at that time regarding the shared technical clerk position.^[28]

16. The Petitioner challenged his proposed termination under the Veterans Preference Act. The County appointed a panel of three individuals (one selected by the County, one by the Petitioner, and a third individual selected

by the first two) to hear the matter. The hearing was held on April 29, 2005, and May 6, 2005. The Petitioner's position was that the shared position did not work because of personality conflicts with the 4-H Director and not for any other reason.^[29] Mr. Stomberg was present during the entire hearing before the panel, testified during the proceeding, and actively sought to have the Petitioner discharged.^[30] Mr. Hubley testified in favor of retaining the Petitioner because he believed that he was a competent employee. Mr. Hubley had some concerns about testifying during the Petitioner's hearing before the panel and feared retaliation by the County.^[31]

17. After the Petitioner was suspended, the shared clerk position was vacant for several months. It was thereafter filled on a temporary basis. The University of Minnesota Regional Extension Office approached a staffing agency to set up arrangements to obtain the temporary employee and found that person. The same temporary employee also provided services to the Veterans Service Office. During the period that the temporary employee worked in the position, the temporary employee approached Mr. Stomberg with complaints regarding the 4-H Program head and the VSO. Concerns about the shared position were also raised with Mr. Stomberg by another temporary employee in March 2005.^[32]

18. In late March of 2005 or early April 2005, Mr. Stomberg had a discussion about the shared technical clerk position with Stephen Ritter, Chairman of the County Board of Commissioners. Mr. Stomberg expressed concern that the position was not working out as he had hoped because the two offices sharing the position were quite different entities and questioned whether the shared position should be eliminated.^[33] Mr. Ritter had the same concerns from the time the position had been developed.^[34]

19. During the week of May 30, 2005, the temporary employee filling the shared clerk position gave notice of her resignation and said she was going to leave that same day. Mr. Byrnes talked the employee into staying until the end of the week.^[35]

20. After the temporary employee left on June 3, 2005, Mr. Byrnes notified Mr. Stomberg that the University of Minnesota would be able to fill that clerical position. Mr. Stomberg never talked to Mr. Byrnes about a County employee remaining in the Extension office or providing assistance to the Extension office.^[36]

21. Mr. Ritter is one of two County Commissioners who serve on the Lyon County Extension Committee with Mr. Byrnes of the University of Minnesota Regional Extension Office. Mr. Ritter had a conversation with Mr. Byrnes prior to June 7, 2005, about the University "taking over" the 4-H position rather than it being a County position. Mr. Byrnes said that the Extension Office would continue "billing back" the County for services provided to the County, and the University would fill the position at that point.^[37]

22. On Friday, June 3, 2005, Mr. Stomberg decided to bring the question of whether the shared clerk position should be eliminated to the County Board at its meeting scheduled for the following Tuesday, June 7, 2005. He had considered eliminating the position for the past several months. Mr. Stomberg discussed the issue of elimination of the shared position with Mr. Ritter either the Friday or the Monday before the meeting when they reviewed the agenda for the Board meeting.^[38]

23. Mr. Stomberg did not have any discussion with Mr. Hubley regarding the clerical needs of his office before deciding that the position should be eliminated.^[39]

24. Mr. Hubley was out of the office on vacation during the week ending June 3, 2005. Mr. Stomberg notified Mr. Hubley by e-mail dated June 3, 2005, that the temporary employee had resigned and that her last day of work was going to be June 3. He indicated that Stacy Schuh had been hired by the Extension Office and would provide support to 4-H for the remainder of the summer. Mr. Stomberg stated that it was his understanding that Ms. Schuh would take phone messages for Mr. Hubley if he wanted her to, but that would be the extent of her responsibility to the Veterans Services Office. Mr. Stomberg said that he had not heard back from the panel as to the status of the Petitioner's appeal. He stated that, "Regardless of the outcome of the appeal, I have serious doubts as to probability that the current arrangement of sharing support staff between VSO and 4-H will be successful. I plan on updating the County Board at the meeting on Tuesday and will ask the board to consider eliminating the shared position." He further stated that he would be available on Monday to discuss this decision.^[40]

25. When Mr. Hubley returned from vacation and read the e-mail from Mr. Stomberg, he sent a reply via e-mail to Mr. Stomberg stating, "I saw it coming a long time ago." Mr. Hubley spoke to Mr. Stomberg on Monday, June 6, 2005, and told him that he did not want to move his office. He also asked Mr. Stomberg if the County Board was going to hire someone to help him, and Mr. Stomberg said that he didn't perceive that happening "for a long, long time."^[41]

26. Later in the day on June 6, 2005, Mr. Hubley received a telephone call from Gary Revier, who was serving on the three-member hearing panel. Mr. Revier told Mr. Hubley that the panel had ruled in the Petitioner's favor.^[42]

27. During the afternoon of June 6, 2005, Mr. Hubley informed Mr. Stomberg that he had heard the panel had made its decision and had decided to give the Petitioner his job back. Mr. Hubley also told Mr. Stomberg that he should reconsider bringing the proposed elimination of the position to the County Board to avoid having the situation blow up in his face.^[43]

28. During the afternoon of June 6, 2005, Mr. Stomberg sent an e-mail message to the member of the hearing panel selected by the County (Richard

Slieter) and asked if the panel had made any progress. This e-mail was prompted by Mr. Hubley's comments. Mr. Slieter sent a response by e-mail at 4:46 p.m. on June 6, 2005, in which he indicated that he had just returned from Redwood Falls, where the panel had met and agreed on its decision. He said that he was going to draft a letter for review by the other panel members that evening and would send Mr. Stomberg a copy of the letter the next day.^[44] Mr. Stomberg read this e-mail in the morning of June 7, 2005.^[45]

29. The Board meeting began at 9:00 a.m. on June 7, 2005. During the meeting, Mr. Stomberg gave a presentation recommending that the shared clerk position be eliminated. He told the Board that he had not been informed of any decision by the panel. He did not tell the Board the information he received from Mr. Hubley about the panel decision because he did not consider that information relevant and he did not trust Mr. Hubley to give accurate information. The Board voted to eliminate the position. No consideration was given to employing anyone part-time.^[46] The meeting minutes relating to the decision state in their entirety:

Stomberg – About a year and a half ago, the 4-H and VSO offices moved together and shared the former Extension Office on the third floor. There was a clerical position approved and shared by them. The person who has been working in this position temporarily has accepted a new job. I have visited with Bob Byrnes and he believes 4-H can make it through the fair with temporary summer help. I would recommend that the shared position be eliminated and separate the offices. The VSO could move back to his former office on second floor and 4-H will have clerical support through Extension. The VSO can utilize work study and interns for help. Discussion on moving 4-H to the fairgrounds and renting out the former Extension offices. Goodenow moved, seconded by Fenske to eliminate the technical clerk position shared by the VSO and 4-H and to relocate the VSO to the former office on the second floor of the courthouse. All voted in favor.^[47]

30. There is no evidence that Mr. Stomberg or any member of the County Board discussed any financial or budgetary reasons for eliminating the position during the meeting.

31. No one from the County asked Mr. Hubley about the needs of the Veterans Services Office or whether work/study students were available to him before making the decision to eliminate the shared clerk position. In fact, no work/study students were available to the Veterans Service Office in June through August of 2005, and no one was available at the time of the hearing in this matter.^[48]

32. By e-mail dated June 7, 2005, at 10:25 a.m., Mr. Slieter notified Mr. Stomberg that a decision had been reached by the panel in the Petitioner's

veterans hearing, and attached a two-page letter decision to the e-mail. In his e-mail message, Mr. Slieter said:

You will note that we were not convinced that Lyon County did everything it could have done to allow Mr. Guza to succeed in his position and we, therefore, found the decision to terminate Mr. Guza not reasonable. Please let us know if you need a signed original of the letter attached. Also, unless we hear otherwise from you, we'll assume that you will deliver a copy of the letter to Mr. Maes. Finally, unless we hear otherwise from you, we assume that this matter is closed as far as it relates to the involvement of the hearing board.^[49]

The attached decision indicated that the panel members had unanimously agreed that the County's action to discharge the Petitioner from his position was not reasonable and that the Petitioner was entitled to reinstatement to his position, along with full back pay and benefits up to June 6, 2005, along with reimbursement for out-of-pocket expenses related to health insurance coverage and an award of reasonable attorney's fees related to this case. The panel noted that the County "did not demonstrate that Mr. Guza was unable or unwilling to meet Lyon County's performance standards. Moreover, we are not convinced that Mr. Guza would be unable to meet those standards if he were provided complete initial and on-going training, periodic coaching, and if his two supervisors and county leadership routinely communicated among themselves and with Mr. Guza on his behalf." The panel also determined that the County did not fulfill the requirement that the Petitioner be given an individual improvement plan describing actions to be improved and/or corrected and that he receive a review within three months to determine if his performance had improved to a satisfactory level.^[50]

33. Mr. Stomberg did not open the June 7 e-mail message from Mr. Slieter until 1:48 p.m. on June 7, 2005, after the Board meeting had concluded.^[51]

34. Mr. Stomberg did not tell Mr. Ritter what Mr. Hubley had said on June 6 about the panel decision favoring the Petitioner. Mr. Ritter first learned of the panel decision during the afternoon of June 7, 2005, after the County Board meeting was over.^[52]

35. Prior to eliminating the shared position, the County, through Mr. Stomberg and Mr. Ritter, was aware that the Petitioner had challenged his removal under the Veterans Preference Act, was aware that a hearing had been held, and was aware that a decision from the hearing panel was pending. In addition, Mr. Stomberg knew that the panel had ruled in favor of the Petitioner the afternoon before the County Board meeting, by virtue of his discussion with Mr. Hubley.^[53]

36. As of the date of the hearing in this matter, the County had not received a signed decision from the panel. Mr. Stomberg never requested that the panel provide the County with a signed decision even though Mr. Slieter's e-mail said to let the panel know if such a copy were needed. Although Mr. Stomberg never verified that Mr. Slieter had sent the June 7, 2005, e-mail message, he believed it was in fact from Mr. Slieter because it was sent in response to a message Mr. Stomberg sent Mr. Slieter. Mr. Stomberg has no reason to dispute the accuracy of the e-mail.^[54]

37. Since the shared technical clerk position was eliminated, the work formerly performed by the Petitioner for the 4-H Program still exists but is being performed by someone else. Stacy Schuh, a University of Minnesota employee, continues to work for the Extension Office doing clerical work for the 4-H Program. The County continues to pay a contracted amount for the work performed by Ms. Schuh.^[55] There is no evidence in the record regarding Ms. Schuh's veteran status.

38. Since the elimination of the shared position, the work formerly performed by the Petitioner for the VSO also continues to exist. No clerical person is currently dedicated to the Veterans Service Office. Personnel in the County Auditor's office answer the VSO telephone and take messages when Mr. Hubley is out of the office.^[56]

39. Mr. Hubley is the only County employee working in the VSO at the present time. He has to type and mail his own letters and make his own copies. Veterans contacting the VSO need forms, letters, updated files, or other assistance. The frequent interruptions by routine telephone calls make it difficult for Mr. Hubley to complete his work. Mr. Hubley spends so much of his time doing clerical duties that he is falling behind and has to work through lunch and take work home. He has had to ignore or put off lower priority matters, such as filing. If he had clerical assistance, it would allow him to do more advocacy. Veterans have to leave messages on Mr. Hubley's telephone if he is out of the office. Because some questions require immediate answers, this is not a satisfactory approach. On a recent day, Mr. Hubley returned to find eleven calls had been received while he was gone. On another occasion when he took a veteran suffering from a panic attack outside, he received six calls in 1½ hours. The VSO currently needs at least half time clerical assistance.^[57]

40. The workload of the Veterans Services Office has not decreased since November of 2003 when the shared technical clerk position was approved. Instead, the Office has seen an increase in its workload and an increased need for veterans' services because of the war in Iraq. Assistance is required for returning troops. Approximately 600 veterans are expected to return to the Lyon County area after serving in the war. The primary need is for mental health services and filing disability claims. Clerical assistance would be very helpful with the significant amount of paperwork involved.^[58]

41. Mr. Hubley has been the VSO in Lyon County for approximately 23 years. Before the shared technical clerk position was developed, the VSO had at times received some clerical coverage from neighboring offices.^[59] For a period of time in the past, the VSO shared the clerical employees working for the County Environmental Office and the County Emergency Services Office. Some portion of the salary of these employees was paid out of the VSO budget. Mr. Hubley was involved in the interviews of some of these employees and participated in evaluating some of them.^[60] The VSO also has received clerical assistance from work/study students at Southwest Minnesota State University at various times.^[61] The VSO has voice mail and e-mail.^[62]

42. Work/study students are not a reliable source of help for the VSO. Work/study students working for the VSO select their availability and work on a sporadic basis, and are not usually able to work on a schedule, since their studies take priority. The maximum number of hours they can work is 25 hours per week. Continuity is often lacking. Older students who were veterans tend to be more knowledgeable than younger students. The work/study students typically take messages for the VSO, print out forms requested by individuals, and do work specifically assigned to them by Mr. Hubley, but they do not tell veterans which particular forms to complete, interview veterans, or conduct claims work. Due to confidentiality concerns, work/study students are not given access to certain information, and are limited in what they can accomplish.^[63]

43. Mr. Hubley has approached prior County Administrators regarding getting more help in the Veterans Services Office but they have been unwilling to do so.^[64]

44. Ms. Coequyt, the 4-H Program Coordinator, resigned from her position effective October 5, 2005.^[65]

45. As of the date of the hearing, the County had not filed an appeal with respect to the decision of the three-member panel. There is no indication in the parties' post-hearing briefs that such an appeal has since been filed.

46. The Petitioner has not had regular full-time employment since January 1, 2005. He has applied for jobs, sent out resumes, and looked on his computer for jobs. He applied for a Veterans Service Office position in Worthington, Minnesota, in March or April 2005. Prior to that time, he applied to Olson and Johnson Trucks and sent out a few replies to post office boxes. He has applied to New York Life, the Farm Bureau, and North Star in Cottonwood, Minnesota. He registered on the computer with a job service organization in Lyon County.^[66]

47. In May and/or June of 2005, the Petitioner did some part-time work driving a farm tractor for which he expects to be paid approximately \$400. He also has made approximately \$1,000 from selling hay. The Petitioner received a little over \$300 per month in disability benefits while employed by the County

stemming from a leg injury he sustained from a gunshot wound while he was in the service. As of December 31, 2004, his disability benefits were increased to \$917 per month. The Petitioner has not applied for unemployment benefits.^[67]

48. The Petitioner filed a petition with the Department of Veterans Affairs on or about June 20, 2005, resulting in the initiation of the present contested case proceeding.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. Under Minn. Stat. §§ 14.50 and 197.481, the Commissioner of Veterans Affairs and the Administrative Law Judge have authority to consider the issues raised in this case under the Veterans Preference Act, Minn. Stat. § 197.46.

2. The Notice of Petition and Order for Hearing was proper in all respects, and the Department of Veterans Affairs has complied with all relevant procedural requirements of law and rule including providing proper notice of this hearing.

3. The Petitioner is a Veteran within the meaning of Minn. Stat. §§ 197.46 and 197.447 and is entitled to all of the protections and benefits afforded by the Veterans Preference Act.

4. Lyon County is a political subdivision of the State of Minnesota within the meaning of Minn. Stat. § 197.46, and its personnel practices are therefore subject to the provisions of the Minnesota Veterans Preference Act, Minn. Stat. §§ 197.46 et seq.

5. Minn. Stat. § 197.60 specifies that the County Board of any county except Clay County, or the County Boards of any two or more counties “shall appoint a veterans service officer and shall provide necessary clerical help, office space, equipment, and supplies for the officer, together with reimbursement for mileage and other traveling expenses”

6. Minn. Stat. § 197.46 prohibits the removal of a veteran from public employment except for incompetency or misconduct shown after a hearing, upon due notice and upon stated charges in writing.

7. The prohibition against removal does not apply if the position was eliminated in good faith for a legitimate purpose.^[68]

8. Whether a Veteran's position has been eliminated in good faith for a legitimate purpose is an affirmative defense for which the public employer has the burden of proof.^[69]

9. Lyon County has not met its burden of proving that it eliminated the Petitioner's position on June 7, 2005, in good faith for a legitimate purpose.

10. The elimination of the Petitioner's position violated the Veterans Preference Act.

11. Any Conclusion more properly termed a Finding is hereby adopted as such.

12. These Conclusions are made for the reasons set out in the Memorandum which is attached to and incorporated by reference in these Conclusions.

Based upon the foregoing Conclusions, and for the reasons set forth in the accompanying Memorandum, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS HEREBY RECOMMENDED: That the Commissioner of Veterans Affairs GRANT the Petition of Harry B. Guza and order that he be reinstated to his last position or a position of similar grade, with all back pay and benefits appropriate for the period from June 7, 2005, forward, and with interest, deducting any amounts the Petitioner earned from other sources during that time period.

Dated: October 28, 2005

s/Barbara L. Neilson

BARBARA L. NEILSON

Administrative Law Judge

Reported: Tape-recorded
Three Tapes; No Transcript Prepared

MEMORANDUM

The Veterans Preference Act protects honorably discharged veterans from arbitrary removal from public employment. Under the Act a veteran can be removed from public employment only for incompetency or misconduct and only after a hearing on those allegations.^[70] This record does not contain any indication of misconduct or incompetency on the part of the Petitioner. The Act does not, however, completely restrict a public employer's exercise or control over its administrative affairs.^[71] Judicial case law interpreting the Act authorizes

the abolishment of a position held by a veteran if the public employer acts in good faith for a legitimate purpose.^[72] If a job is abolished for no good reason other than to get rid of the veteran, the Veteran's Preference Act and all of the rights afforded by it will apply.^[73] As the Minnesota Supreme Court noted in *State ex rel. Boyd v. Matson*:

The purpose of this section [the Veterans Preference Act] is to take away from the appointing officials the arbitrary power, ordinarily possessed, to remove such appointees at pleasure; and to restrict their power of removal to the making of removals for cause. But it is well settled that statutes forbidding municipal officials from removing appointees except for cause are not intended to take away the power given such officials over the administrative and business affairs of the municipality, and do not prevent them from terminating the employment of an appointee by abolishing the office or position which he held, if the action abolishing it be taken in good faith for some legitimate purpose, and is not a mere subterfuge to oust him from his position. [Citations omitted.] The municipal authorities may abolish the position held by an honorably discharged soldier and thereby terminate his employment, notwithstanding the so-called veteran's preference act.^[74]

As reflected in the Findings above and in the underlying petition filed with the Department of Veterans Affairs, the County in the fall of 2004 notified the Petitioner that it intended to discharge him for incompetence and insubordination. The Petitioner requested and received a Veterans Preference Hearing before a three-member hearing panel. The panel ultimately rendered its decision on June 6, 2005, finding that the employer acted unreasonably in terminating the Petitioner. The panel ordered reinstatement with full back pay and benefits. Lyon County abolished the position formerly held by the Petitioner in a County Board meeting held on June 7, 2005. The Petitioner thereafter filed a petition with the Department of Veterans Affairs alleging that the County had violated his veterans preference rights. The Department issued a Notice of Petition and Order for Hearing dated July 11, 2005, in which it noted that it appeared from the petition that the County had, in a non-good faith manner, eliminated the public position held by the Petitioner, and ordered a contested case hearing before the Administrative Law Judge. At the commencement of the August 19, 2005, hearing, the parties agreed that the issue presented for determination in this case is whether the County's action in eliminating the Petitioner's position on June 7, 2005, was in good faith within the meaning of the Veterans Preference Act. The Petitioner's earlier proposed removal for incompetency or misconduct was addressed by the three-member panel and is not an issue in this proceeding.

The Minnesota Supreme Court has held that an employer may terminate the employment of a veteran by abolishing the office or position which he held "if the action abolishing it be taken in good faith and for some legitimate purpose,

and is not a mere subterfuge to oust him from his position.”^[75] In determining whether a position has been abolished in good faith, the Minnesota courts have looked at several factors, including: (1) whether the reasons articulated by the employer have a legitimate, factual basis;^[76] (2) whether the job duties previously performed by the veteran remain to be performed or are being performed by others;^[77] and (3) whether the substance of the decision to abolish the veteran’s position was an objective and reasonable exercise of administrative discretion.^[78] Whether a public employer abolished a position in good faith is a question of fact.^[79] The burden is on the employer to establish this affirmative defense by a preponderance of the evidence.^[80] In determining whether a position has been eliminated in good faith, a reviewing tribunal is obliged to examine the substance of the action and not just the form.^[81]

Based upon a consideration of the entire record in this matter, the Administrative Law Judge concludes that the County has failed to provide persuasive evidence that it in fact acted in good faith when it eliminated the shared technical clerk position. Most importantly, the Board acted to eliminate the position just one month after the conclusion of the panel hearing relating to its earlier attempt to discharge the Petitioner for incompetence and just one day after the County Administrator was told by the Veterans Service Officer that the panel had ruled in favor of the Petitioner. Even though the Board members had not seen the actual panel decision at the time of their June 7 meeting, it is evident that, at a minimum, the County Administrator and the Chair of the County Board were well aware that a decision was imminent. The County Administrator’s apparent failure to tell the Board the information he had received from the VSO about the nature of the panel decision deprived the Board of pertinent information of which it should have been aware when deciding whether the position should be eliminated.^[82] It is significant that the County Administrator, who had earlier taken an active role in seeking to discharge the Petitioner and testifying before the panel in support of that discharge, was also the official who decided that the Board should consider eliminating the position.^[83]

As reflected in the Findings above, the evidence showed that the job duties previously performed by the Petitioner under the shared technical clerk position remain to be performed or are being performed by others. The Petitioner’s 4-H Program duties were assigned to Ms. Schuh in the 4-H office, and there apparently is no dispute that those duties continue to be performed. The Petitioner’s VSO duties were assigned to a lesser extent to employees in the Office of the County Auditor, who will answer the phone and take messages for the VSO when he is out. There is no evidence that those now performing the work previously performed by the Petitioner are veterans with more seniority than the Petitioner. The County witnesses acknowledged that they believed the VSO needed clerical help during the fall of 2003 when the shared position was first created, and there was no credible evidence that the need for VSO clerical work had diminished by June 2005. Rather, the evidence at the hearing showed that the clerical work in the VSO has increased due to returning veterans from the

Iraq War, and approximately 600 soldiers are soon expected to return to the area. The undisputed evidence also showed that no work/study students or interns were available to help the VSO at the time the position was eliminated, and the assistance that is provided by work/study students when they are available is limited. The County Board's failure to consult Mr. Hubley about his clerical needs before taking action to abolish the position along with all clerical help for the VSO provides further support for the finding that the County did not abolish the position in good faith and had no legitimate basis for its decision.^[84] Moreover, the County's contention that it was simply restoring the VSO to the "status quo" of the past 20 years prior to the creation of the shared position was not accurate in light of evidence that the VSO had at times in the past received clerical assistance from other County offices that went beyond taking telephone messages.^[85]

In addition, it does not appear that the substance of the decision to abolish the shared technical clerk position was an objective and reasonable exercise of administrative discretion. There is no persuasive evidence that the position was eliminated based on any careful analysis of budgetary or financial savings that were needed. The Board Chair testified that he could not remember whether the Board discussed financial considerations at the meeting and the County Administrator testified he didn't know whether the County made the decision as a budget item. There is no evidence that the County Board as a whole discussed or explicitly relied upon any budgetary savings when it voted to eliminate the position on June 7. While financial cost savings may have been in the minds of the County Administrator and the Board Chair when the position was proposed for elimination to the same extent that financial concerns are currently a consideration in all decisions made by local units of government, there was no persuasive evidence that the Board was primarily motivated by cost savings when it decided to eliminate the position. The meeting minutes from the June 7 meeting do not reflect such a discussion of financial cost savings or budget concerns, even though the County witnesses agree that the minutes typically summarize relevant and important discussions that are held at the Board meetings. No detailed evidence of any such savings were provided at the hearing, apart from the Administrator's conclusory assertion during his cross examination that the County saved \$2,200 in its budget for 2006 by using the contracted services. Moreover, the County witnesses acknowledged that the County would still be required to make payments for amounts "billed back" by the Extension Office for the 4-H position, which would include some payment for the clerical services provided by Ms. Schuh. The County witnesses were not able to provide the specific amount expected to be billed back, and did not introduce a copy of the County's contract with the Extension Office.

The County's only two witnesses, Mr. Stomberg and Mr. Ritter, ultimately agreed that it was fair to say that the primary reason for the elimination of the position was based on their subjective perception that the position was "not working." This perception, in turn, was based on vague assertions about the alleged differing nature or incompatibility of the two offices and the personalities

of the office heads, and not upon a careful analysis of any differing or conflicting clerical needs of the two offices. The County witnesses provided general testimony that they had initial concerns about whether this position would work at the time it was created, but were willing to give it a try, and they had additional concerns as time went on. Although the County witnesses alleged that Mr. Byrnes in the Extension Office also had concerns about the position not working, the County did not call Mr. Byrnes to testify. The County did not provide any specific or detailed examples of legitimate difficulties relating to the position, and the VSO and the Petitioner both testified that the clerical skills involved in each position were similar and the position could have succeeded with more time and supervisory effort and the resolution of personality conflicts with Ms. Coequyt. In addition, the County's assertion that clerical help could not be successfully shared between two different offices in the courthouse was contrary to evidence that the VSO has historically shared clerical help with other County offices. It is more likely that the reason that the position was perceived not to be working was due to personality conflicts that the Petitioner, temporary workers, and others had with the 4-H Program director, who has since resigned.

The County Administrator testified that he began thinking about whether the position should be eliminated in approximately March 2005. When the temporary employee resigned effective June 3, Mr. Stomberg notified the VSO that Ms. Schuh had been hired by the Extension Office and would be providing support to 4-H "for the remainder of the summer" and that her responsibility to the VSO would only involve taking phone messages for him. The County Administrator then made the decision to ask the Board to consider eliminating the shared position at its June 7 meeting, and had some discussion with the Board Chair about adding this agenda item. The County admittedly lacked knowledge of the VSO's clerical requirements at the time the decision was made to eliminate the position. There is no evidence that there had been any decrease in the VSO's workload or in his needs for clerical support. Moreover, the County made no attempt to engage in any discussion with the VSO about his clerical needs or the decision to eliminate the position in advance of placing the item on the Board's agenda. The County Administrator's June 3 e-mail informed the VSO that the position would be proposed for elimination at the June 7 meeting and notified the VSO that he would be "available [on June 6]. . . to discuss this decision." When the VSO went to the County Administrator on June 6 and asked if the County Board was going to hire someone to help him, he was simply told that that would not happen for "a long, long time."

The County Administrator testified that the Board's decision was made with the understanding that the 4-H portion of the position was "gone" because the University of Minnesota had already hired an employee (Ms. Schuh). The County's post-hearing brief carries this argument even further by asserting that the County "was essentially forced to eliminate this new position following the University of Minnesota's decision to hire its own employee."^[86] However, the hearing record does not support a conclusion that the University of Minnesota had already unilaterally decided to "take over" the position and hire its own

permanent replacement. The County Administrator testified that Mr. Byrnes told him that the University would be able to fill that clerical position, but did not explicitly testify that the University was insisting upon "taking over" the position at that point. The County Administrator admitted that he never talked to Mr. Byrnes prior to Ms. Schuh's hire in June 2005 about a County employee remaining in the Extension Office or providing assistance to that office. The e-mail sent to the VSO by the County Administrator on June 3 simply said that Ms. Schuh "has been hired by the MN Extension Office and will be providing support to 4-H for the remainder of the summer." Following the Petitioner's suspension during the fall of 2004, the University had similarly arranged with a staffing agency to provide a temporary employee for the shared position and there was no action by the County at that point to eliminate the shared position or curtail clerical help to the VSO. The County did not call Mr. Byrnes to testify, and there was virtually no other testimony explaining the reasons why the decision was made that the University would hire someone for the 4-H clerical position, whether the County acquiesced or participated in this decision, why the County did not require compliance with the existing service contract, or why the further decision was made to terminate the VSO's clerical services without advance discussion with the VSO and at a time when the need for veterans' services in the County was increasing. Moreover, the minutes of the Board meeting indicate that the County Administrator informed the Board that he had "visited with Bob Byrnes and he believes 4-H can make it through the fair with temporary summer help. I would recommend that the shared position be eliminated and separate the support through Extension. The VSO can utilize work study and interns for help." It thus appears that the Board voted not only to eliminate the shared position on June 6, but also to authorize separate support for the 4-H Program through the Extension Office.

The County failed to provide balanced, factual evidence supporting its decision to eliminate the position, and has not shown that its decision to eliminate the shared position and allow the Extension Office to employ a 4-H clerical employee was an objective and reasonable exercise in administrative discretion. The record as a whole suggests that the County took advantage of the resignation of the existing temporary employee to eliminate the County position and thereby avoid any possibility of being ordered to reinstate the Petitioner. The County elected to allow the University (who it believes to be exempt from the Veterans Preference Act)^[87] to assume employer status with respect to the 4-H portion of the position.

The Administrative Law Judge thus finds that the County has failed to meet its burden to show that it acted in good faith for a legitimate purpose when it eliminated the Petitioner's position. The Petitioner has shown the County's stated reasons for its actions to be a mere pretext to accomplish his removal from County employment. The Petitioner is therefore entitled to reinstatement to his last position or a position of similar grade, with benefits, back pay and interest^[88] since June 7, 2005.

A veteran has a duty to mitigate damages, and any back pay award should be reduced by the amount which the veteran could have earned through the exercise of due diligence in an employment of a like kind or grade.^[89] A public employer has the burden of showing that the veteran failed to mitigate damages.^[90] The Petitioner has been unemployed since January 2005, but testified to the extent of his job search. The County did not show that comparable jobs were available in the area for which the Petitioner would qualify, or otherwise establish that the Petitioner failed to mitigate his damages. The money earned by the Petitioner since June 2005 should be off-set from his back pay award.^[91] The Petitioner did not receive unemployment compensation. There has been no showing that the disability payments that have been received by the Petitioner should be deducted from his back pay.

B.L.N.

^[1] Stipulation of the Parties; Testimony of Harry Guza.

^[2] Testimony of Loren Stomberg ("educators" were formerly called County Extension Agents).

^[3] Testimony of L. Stomberg.

^[4] Testimony of Jim Hubley.

^[5] Testimony of L. Stomberg.

^[6] Testimony of L. Stomberg, Stephen Ritter.

^[7] Testimony of L. Stomberg.

^[8] Testimony of J. Hubley.

^[9] Testimony of L. Stomberg, S. Ritter.

^[10] Testimony of L. Stomberg.

^[11] Testimony of L. Stomberg.

^[12] Testimony of L. Stomberg, H. Guza.

^[13] Ex. 9.

^[14] Testimony of H. Guza; Ex. 11.

^[15] Testimony of H. Guza, J. Hubley.

^[16] Testimony of J. Hubley.

^[17] Testimony of J. Hubley, H. Guza; Ex. 10.

^[18] Testimony of H. Guza; Ex. 10.

^[19] Testimony of J. Hubley, H. Guza.

^[20] Testimony of J. Hubley.

^[21] Testimony of J. Hubley, H. Guza.

^[22] Testimony of L. Stomberg, J. Hubley, H. Guza.

^[23] Testimony of L. Stomberg.

^[24] Testimony of J. Hubley, H. Guza.

^[25] Testimony of J. Hubley.

^[26] Testimony of H. Guza.

^[27] Testimony of L. Stomberg, J. Hubley.

^[28] Testimony of H. Guza, L. Stomberg.

^[29] Testimony of L. Stomberg, H. Guza.

^[30] Testimony of L. Stomberg; Petition for Relief under the Veterans Preference Act.

^[31] Testimony of J. Hubley.

^[32] Testimony of L. Stomberg.

^[33] Testimony of L. Stomberg, S. Ritter.

^[34] Testimony of S. Ritter.

^[35] Testimony of L. Stomberg.

[36] Testimony of L. Stomberg.

[37] Testimony of S. Ritter; Ex. 8.

[38] Testimony of L. Stomberg, S. Ritter.

[39] Testimony of L. Stomberg, J. Hubley.

[40] Testimony of L. Stomberg, J. Hubley; Ex. 1.

[41] Testimony of J. Hubley; Ex. 1.

[42] Testimony of J. Hubley.

[43] Testimony of L. Stomberg, J. Hubley.

[44] Ex. 2.

[45] Testimony of L. Stomberg.

[46] Testimony of L. Stomberg, S. Ritter.

[47] Ex. 7. The County Board meetings are not tape-recorded.

[48] Testimony of J. Hubley.

[49] Ex. 4; Testimony of L. Stomberg.

[50] Ex. 4.

[51] Ex. 5; Testimony of L. Stomberg.

[52] Testimony of S. Ritter.

[53] Testimony of L. Stomberg, S. Ritter, J. Hubley.

[54] Testimony of L. Stomberg; Ex. 3.

[55] Testimony of L. Stomberg.

[56] Testimony of J. Hubley, L. Stomberg, H. Guza.

[57] Testimony of J. Hubley.

[58] Testimony of S. Ritter, J. Hubley.

[59] Testimony of J. Hubley, L. Stomberg.

[60] Testimony of J. Hubley.

[61] Testimony of L. Stomberg, J. Hubley, H. Guza, David Gau.

[62] Testimony of L. Stomberg.

[63] Testimony of J. Hubley, D. Gau.

[64] Testimony of J. Hubley.

[65] Testimony of L. Stomberg; Ex. 8.

[66] Testimony of H. Guza.

[67] Testimony of H. Guza.

[68] *State ex. rel. Boyd v. Matson*, 193 N.W.2d 30 (Minn. 1923); *Young v. City of Duluth*, 386 N.W. 2d 732, 737 (Minn. 1986).

[69] *Caffrey v. Metropolitan Airports Commission*, 246 N.W. 2d 637, 641 (Minn. 1976).

[70] Minn. Stat. § 197.46.

[71] *State ex. rel. Boyd v. Matson*, 193 N.W.2d 30 (Minn. 1923).

[72] *Gorecki v. Ramsey County*, 437 N.W. 2d 646, 650 (Minn. 1989).

[73] *Young v. City of Duluth*, 386 N.W. 2d at 737.

[74] 155 Minn. 137, 193 N.W. 30, 32 (Minn. 1923).

[75] *Caffrey v. Metropolitan Airports Commission*, 246 N.W. 2d at 641.

[76] *Caffrey*, 46 N.W. 2d at 641.

[77] *Young*, 386 N.W. 2d at 738-739.

[78] *Gorecki*, 437 N.W. 2d at 650.

[79] *State ex. rel. Niemi v. Thomas*, 223 Minn. 435, 438, 27 N.W. 2d 155, 157 (1947).

[80] *Caffrey*, 246 N.W. 2d at 641.

[81] *Myers v. City of Oakdale*, 409 N.W.2d 848, 850 (Minn. 1987).

[82] The Administrator's contention that he did not trust the VSO to give accurate information because disciplinary action had been taken against the VSO in the past for falsifying payroll records was denied by the VSO and the County did not provide any further evidence supporting its assertion or otherwise undermining the VSO's honesty or trustworthiness.

[83] The Board Chair testified that he voted to eliminate the position in part because the County Administrator recommended the elimination.

[84] This is particularly true in light of the requirement in Minn. Stat. § 197.60, subd. 1, that counties provide necessary clerical help to the VSO.

^[85] The Administrative Law Judge credits the testimony of Mr. Hubley in this regard, since he has been the VSO for approximately 23 years, while Mr. Stomberg has been the County Administrator only since August of 2003.

^[86] County's post-hearing brief at 2. The County argues that "the severance of the newly created 'shared position' between these two entities created a situation where Lyon County had no choice but to dissolve the position."

^[87] See *Winberg v. University of Minnesota*, 499 N.W.2d 799 (Minn. 1993).

^[88] *Henry v. Metropolitan Waste Control Commission*, 401 N.W.2d 401,

^[89] *Spurck v. Civil Service Board*, 42 N.W.2d 720 (Minn. 1950); *Tombers v. City of Brooklyn Center*, 611 N.W.2d 24 (Minn. App. 2000).

^[90] *Henry v. Metropolitan Waste Control Commission*, 401 N.W.2d 401, 407 (Minn. App. 1987).

^[91] As noted in *Tombers v. City of Brooklyn Center*, 611 N.W.2d at 27, to avoid double recovery, it is proper to offset the amount the employer owes under the Veterans Preference Act by the amount the employee earned during the relevant period. The Petitioner argues that wages earned by the Petitioner for driving a tractor or amounts received for selling hay he has cut on his farm should not be deducted because those amounts were not earned in employment of like kind or grade to the shared technical clerk position. No specific authority is cited for this proposition, and the Administrative Law Judge is not aware that such a distinction should be made.